

4. INITIAL STATEMENT OF REASONS

**STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW
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**TITLE 1, CALIFORNIA CODE OF REGULATIONS
ADOPT SECTIONS 50, 52 AND 54, AND AMEND SECTION 55,
REGARDING EMERGENCY REGULATIONS**

INITIAL STATEMENT OF REASONS

INTRODUCTION

In 2006 the Legislature passed and the Governor signed AB 1302 (Jerome Horton), a bill that, among other things, amended sections 11346.1 and 11349.6 of the Government Code – the law governing how state agencies adopt emergency regulations. The changes in law enacted by AB 1302 took effect on January 1, 2007. AB 1302 contains an uncodified section providing that the changes it enacts regarding emergency regulations apply only to emergency regulations initially submitted to OAL on or after 1/1/07.

AB 1302 requires an agency adopting emergency regulations to provide five working days advance public notice of the adoption (Government Code § 11346.1(a)(2)). It also mandates that OAL wait five calendar days from receiving an emergency prior to taking action on it in order to permit public comment on the proposal (Government Code § 11349.6(b)). This advance notice and public comment period process adds a minimum of 12 days to the time it will take an agency to adopt an emergency regulation.

In enacting this law, the Legislature recognized that in some circumstances this minimum 12-day delay could be contrary to the public interest. Sections 11346.1 and 11349.6 each contain language saying that the delays are not required when “the emergency situation clearly poses such an immediate serious harm that delaying action to allow public comment would be inconsistent with the public interest.” The statute, however, provides no definition or guidance as to what circumstances do and what do not satisfy this “immediate, serious harm” standard. The proposed regulation clarifies this statute by requiring an agency submitting emergency regulations to OAL without providing prior public notice to demonstrate that a delay of 12 days will cause substantial harm and that the proposed regulation can be reasonably expected to prevent or alleviate that harm.

AB 1302 also changed the initial effective period for emergency regulations and modified the law governing readoption of emergency regulations. Emergency regulations initially submitted to OAL prior to 1/1/07 are effective for 120 days. They may be readopted with OAL’s approval for additional periods of 120 days. There is no statutory limit to the number of times an emergency regulation may be readopted. There are no statutory standards guiding OAL’s decision as to whether a request to readopt should be granted or denied. Under AB 1302, emergency regulations are initially effective for 180 days. OAL may approve not more than two readoptions of an emergency regulation, each for a period of 90 days. AB 1302 also established

a standard for when an emergency regulation should be readopted by providing that readoption is permissible only when "the agency has made substantial progress and proceeded with diligence" to adopt the emergency regulations on a permanent basis. The proposed regulations clarify an ambiguity in the AB 1302 scheme by specifying that the 5-day advance public notice of the adoption required by section 11346.1(a)(2) of the Government Code is not required for readoption of an emergency regulation.

AB 1302 imposes a new requirement in justifying the use of the emergency regulation process. It provides that when "the situation identified in the finding of emergency existed and was known by the agency adopting the emergency regulation in sufficient time to have been addressed through nonemergency regulations . . . the finding of emergency shall include facts explaining the failure to address the situation through nonemergency regulations." The proposed regulation clarifies this statute by specifying that this explanatory statement is required whenever the situation identified in a finding of emergency existed and was known to the rulemaking agency 270 days or more prior to the submission of the emergency regulation to OAL. The period of 270 days, approximately 9 months, was selected based upon OAL's experience under the pre-AB 1302 law that the large majority of emergency regulations are adopted as permanent regulations in 240 days or less.

Finally, the proposed regulations make conforming changes to title 1, Cal. Code Regs. section 55, to accommodate statutory changes enacted by AB 1302. Section 55 is the current regulation governing OAL review of public comments on emergency regulations. Under prior law, OAL review of public comments was functionally permissive rather than mandatory. Under AB 1302 OAL is mandated to review public comments "except when the emergency situation addressed by the regulations clearly poses such an immediate, serious harm that delaying action to allow public comment would be inconsistent with the public interest." The proposed regulations modify section 55 to accommodate this changed statutory scheme.

SPECIFIC PURPOSE OF EACH SECTION – GOVERNMENT CODE 11346.2(b)(1)

The specific purpose of each adoption, and the rationale for the determination that each adoption is reasonably necessary to carry out the purpose for which it is proposed, together with a description of the public problem, administrative requirement, or other condition or circumstance that each adoption is intended to address, is as follows:

Proposed Section 50(a) provides that an agency submitting emergency regulations must include one of two statements. The agency must verify either that it has complied with the 5-day advance notice requirement of section 11346.1 of the Government Code, or that the emergency situation addressed by the regulation clearly poses such an immediate, serious harm that delaying action to allow public comment would be inconsistent with the public interest. This provision is necessary so that rulemaking agencies will have clear and objective guidance, when preparing their emergency rulemaking files, on how to document that the AB 1302 notice requirements have been met, or on how to identify the file as one which is exempt from the notice requirement because of the immediate serious harm that delay to provide notice and comment would cause.

Proposed Section 50(b) establishes two standards that the emergency situation must satisfy if it is to justify waiver of the AB 1302 notice and comment requirements. These two standards are that the emergency situation will result in serious harm if the regulations are not submitted to OAL within 12 calendar days that the regulation can reasonably be expected to prevent or substantially alleviate that harm. The period of 12 days was selected because it is the minimum amount of time that is added to the emergency rulemaking adoption process through the notice and comment procedure. If an agency cannot demonstrate the requisite harm within the 12-day period, there is adequate time to complete the notice and comment process. This subdivision is necessary in order to give agencies clear guidance in distinguishing those emergency situations which require advance public notice and a mandatory comment period from those that do not.

Proposed Section 50(c) provides that OAL will disapprove an emergency regulation submitted with an "immediate harm" statement pursuant do subdivision (a)(2), if the emergency situation does not, in OAL's view, satisfy the standards of subdivision (b). Government Code section 11349.6 requires OAL to disapprove a regulation "if it determines the agency failed to comply with Section 11346.1" but it does not specify that the agency's compliance requires it to demonstrate clearly that waiver of the notice requirements is justified. This subdivision specifies that OAL will treat failure to provide the advance public notice required by Government Code section 11346.1(a)(2) as a failure to "comply with Section 11346.1" unless the facts offered to justify waiver of the notice requirements do, in OAL's view, justify the waiver. This subdivision is necessary to make specific the fact that OAL's review of the notice requirement for an emergency regulation includes independent evaluation of the nature of the emergency cited by the agency to justify waiver of the notice requirement. It is also necessary to clarify for agencies that an emergency regulation submitted with a certification pursuant to subdivision (a)(2) will be disapproved by OAL if the certification is not adequately supported by facts.

Proposed Section 52(a) clarifies that readoption of an emergency regulation does not require advance public notice pursuant to section 112346.1(a)(2) of the Government Code. AB 1302 both required advance public notice regarding adoption of emergency regulations and established distinct procedures for readoption of emergency regulations. Under the prior statute there was no legal distinction between an initial adoption of an emergency regulation and the readoption of that emergency regulation. In establishing unique requirements and procedures with respect to readoption, AB 1302 creates legal distinctions between the two. Among these differences are the fact that an emergency regulation is effective for 180 days following its initial adoption but only for 90 days following a subsequent readoption, and the fact that readoption is not permitted unless the rulemaking agency demonstrates that it is making substantial progress to adopt the emergency regulation as a permanent regulation.

AB 1302 is not clear regarding whether or not the 5-day advance public notice requirement applies to readoption of an emergency regulation. The proposed regulation resolves that ambiguity by clarifying that a request to readopt an emergency regulation does not require advance public notice. The purpose of the advance notice requirement of AB 1302 was to increase the opportunity for interested persons to comment upon emergency regulations prior to their enactment. This purpose cannot be served with respect to readoption of emergency regulations because regulations subject to readoption are already in effect.

Furthermore, AB 1302 creates a legal standard that must be met for readoption which is not required for an initial adoption. Readoption is only permitted if "the agency has made substantial progress and proceeded with diligence" to adopt the emergency regulations permanently. For obvious reasons, this is not an issue with respect to emergency regulations that have not yet been initially adopted. The fact that readoption requires a different factual justification than that required for initial adoption of the emergency is further evidence of legislative intent that OAL review of requests to readopt an emergency regulation serves a different public purpose than does its review of initial requests to adopt an emergency regulation.

Since AB 1302 is ambiguous with respect to the applicability of the advance notice requirement to readoption of emergency regulations, it is necessary to clarify this matter by regulation. The proposed regulation does this by specifying that a rulemaking agency is not required to comply with the advance notice requirement when seeking readoption of an emergency regulation.

Proposed Section 52(b) specifies three types of information that must be submitted to OAL when requesting readoption. An agency requesting readoption must provide a statement demonstrating the continued existence of the emergency, the documentation required for the initial adoption if it is necessary to update that documentation to reflect any changed circumstances since the initial adoption, and a statement providing facts demonstrating that the agency has made substantial progress and proceeded with diligence to adopt the regulations permanently. This regulation is necessary to provide guidance to rulemaking agencies regarding the information that they must provide to OAL when seeking readoption of an emergency regulation. It is also necessary to establish uniformity in requests for readoption, thus allowing OAL to provide consistent review of these requests regardless of which agency submits the request.

Proposed Section 54 specifies that, in adopting an emergency regulation, the rulemaking agency must provide the explanation of delay required by section 11346.1(b)(2) of the Government Code whenever the situation identified in the finding of emergency existed and was known to the agency more than 270 days prior to submission of the emergency regulation to OAL. This regulation is necessary to make this statutory provision specific. The statute requires the explanation whenever the situation existed and was known to the agency "in sufficient time to have been addressed through nonemergency regulations". The statute does not provide adequate specificity to identify to rulemaking agencies whether a particular set of facts requires compliance with this provision of the statute.

The use of 270 days as the specific period that is "sufficient time to have been addressed through nonemergency regulations" is based upon legal analysis and historical data of emergency rulemaking files previously submitted to OAL. As a legal matter, the period contemplated by this section of the Government Code cannot be more than one year, since the APA provides in §11346.4(b) that a Notice of Proposed Rulemaking is valid for only one year. Based upon this, the Legislature clearly intended that "sufficient time to have been addressed through nonemergency regulations" must be a period of one year or less.

OAL's experience with emergency regulations is that the substantial majority of them are adopted as permanent regulations within less than one year. In 2005 OAL received 74 initial

emergency regulations and 34 requests to readopt emergency regulations. In 2006 OAL received 88 initial emergency regulations and 25 requests to readopt emergency regulations. These data indicate that well over half of all emergency regulations were able to be adopted as permanent regulations within the 120-day effective period that existed during 2005 and 2006. Although OAL statistics cannot determine how many of the readopted emergency regulations had been adopted as permanent rules without requiring a second readoption – i.e., they had been adopted as permanent regulations within 240 days of their initial adoption – it is entirely reasonable to assume that at least half of all readopted emergency regulations do not require a second readoption. The best evidence indicates, therefore, that 80% or more of emergency regulations have historically been adopted as permanent regulations within 240 days of their initial adoption.

Under AB 1302 an emergency regulation is initially effective for 180 days. This indicates a judgment by the Legislature that an agency should be able to complete the permanent adoption of an emergency rule within 180 days. OAL's statistics demonstrate that this is reasonable. However, in permitting readoptions AB 1302 also recognized that in some cases more than 180 days is required to adopt permanent regulations. By evaluating the legal benchmarks that the Legislature established along with OAL's historical data regarding emergency regulations, the period of 270 days was selected as a reasonable specification for the "sufficient time to have been addressed through nonemergency regulations" which will require an explanation of delay pursuant to section 11346.1(b)(2) of the APA.

Proposed Amendments to Section 55 are necessary to update the current regulation governing OAL review of public comments to reflect statutory changes enacted by AB 1302. The current version of section 55 is based the pre-2007 version of the APA under which OAL review of public comments was discretionary. AB 1302 modified the APA to make OAL review of public comments mandatory "except when the emergency situation addressed by the regulations clearly poses such an immediate, serious harm that delaying action to allow public comment would be inconsistent with the public interest." The proposed amendment to section 55 specifies that OAL review of public comments is mandatory "except when the emergency situation addressed by the regulations clearly poses such an immediate, serious harm that delaying action to allow public comment would be inconsistent with the public interest." The amendments also eliminate a provision requiring comments to be received before OAL has made its decision on the rulemaking. Since the AB 1302 amended the APA to prohibit OAL from making a decision on a file in less than five days unless the "immediate, serious harm" exemption is invoked, the requirement that comments be received before OAL makes its decision is superfluous. The existing requirement that comments be received within 5 days of the submission of the rulemaking to OAL is sufficient to ensure their timely receipt and consideration by OAL.

OTHER REQUIRED SHOWINGS – GOVERNMENT CODE 11346.2(b)(2)-(4)

Studies, Reports, or Documents Relied Upon – Gov. Code 11346.2(b)(2): None.

Reasonable Alternatives Considered – Gov. Code 11346.2(b)(3)(A): None

Reasonable Alternatives That Would Lessen the Impact on Small Businesses
– Gov. Code 11346.2(b)(3)(B): None

Evidence Relied Upon to Support the Initial Determination That the Regulation Will Not Have A Significant Adverse Economic Impact On Business – Gov. Code 11346.2(b)(4):

The proposed regulation will not have a significant adverse economic impact upon business since it applies only to state agencies adopting or readopting regulations pursuant to the Administrative Procedure Act.